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Pillar Two Unit
Corporate & International Tax Division
Treasury
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Your reference

Our reference

MML/
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16 April 2024

Dear Sir / Madam,

Submission on International Taxation - Global and Domestic Minimum Tax - Primary Legislation

We thank you for the Exposure Draft Legislation with respect to Pillar Two released on 21 March, 2024 and are pleased to make the following submission principally on the definition of "Excluded Entity" including "Real Estate Investment Vehicle" and "Investment Fund", and related matters.

We thank you for this opportunity and would be pleased to discuss and explore the issues in more detail at your convenience.

1. **Definition of "Excluded Entity" including "Real Estate Investment Vehicle**":

   Given the broad application of and detailed compliance and reporting obligations under the draft Pillar 2 Legislation/Regime, it is critical to provide clarity and certainty on the potential carve-outs or exemptions for "Excluded Entities", including a Real Estate Investment Vehicle and an "Investment Fund". We deal firstly with the definition of a Real Estate Investment Vehicle provided in the Exposure Draft at Section 27, Part 6 - Interpretation.

   Section 27 provides a specific definition of a "Real Estate Investment Vehicle" and to qualify as a Real Estate Investment Vehicle an entity must meet all of 3 criteria. Items (a) and (c) provide concepts that are generally well understood and not controversial, including firstly, the taxation of the entity achieves a single level of taxation as specified and secondly, that the entity is 'widely held'.

   While earlier OECD/G20 Guidance recognises the importance of completeness, consistency and certainty of outcomes with respect to Excluded Entities, this Guidance refers to Real Estate Investment Vehicles (and Investment Funds) as 'tax neutral investment vehicles' and as those entities which exclusively or almost exclusively hold assets or invest funds (per the activities test).

   The third and very important criteria referred to in the Section 27 definition of Real Estate Investment Vehicle states that the relevant entity 'holds predominantly immovable property'.

   Although the excluded entities refer to 'real estate' investment vehicles, we strongly recommend that the definition in the Legislation and/or the Explanatory Memorandum be updated and/or amended to confirm that 'immovable property' includes infrastructure and related assets including, amongst other things, toll roads, airports, ports, hospitals, social housing and schools, which are effectively all structures, interests in or over land, buildings and related fixtures associated with these infrastructure assets.

While we accept and appreciate the importance of having a consistent international approach to key concepts (see section 3) including “excluded entity” in Section 16 and more specifically “Immovable Property” in Section 27 as referred to above, it would be highly desirable to provide some further guidance (potentially in the Explanatory Memorandum / materials accompanying the Exposure Draft Legislation) to clarify the concept of “immovable property” including as is utilised in certain of our recent Double Tax Treaties including the German / Australia Double Tax Treaty (Article 6) and the Australia / Iceland Double Tax Treaty (Article 6).

The concept or term “Immovable Property” as used in Article 6.2 of the German Treaty states that the term shall include, amongst other things, a lease of land or any other interest in or over land, property accessory to a immovable property, related rights and the right to explore for mineral, oil or gas deposits or other natural resources and a right to mine these resources.

Further, the Explanatory Materials at page 24 which accompany the Exposure Draft Legislation, provides further guidance on the concept of “widely held” to include a situation where the Real Estate Investment Vehicle is owned by a small number of other widely – held investment entities or pension funds with “numerous beneficiaries”. Further clarification of “numerous beneficiaries” would be much appreciated in the Explanatory Materials.

2. **Investment Fund**: Definition of “Excluded Entity:

Similarly, the reference to an “Investment Fund” in Section 16 is followed by a more specific definition of an “Investment Fund” which must meet all of the criteria set out in (a) to (g) in Section 27, Part 6.

While many of these criteria are familiar or similar to the concept of “Managed Investment Scheme” under Australian Corporations Law, it would be highly desirable to provide further specific details and certainty on how these criteria will be satisfied in the ED Legislation and/or the Explanatory Memorandum / Materials accompanying the Bill.

Although there is useful OECD/G20 Guidance on this issue, the particular criteria that perhaps would benefit from certain expansion or commentary include the following:

(b) it invests in accordance with a defined investment policy,
(d) it is primarily designed to generate investment income or gains, or protect against a specific or general event or outcome; and
(g) it is managed by investment fund management professionals on behalf of its investors.

We trust that these comments are of much interest and assistance and look forward to progressing with you.

Yours sincerely

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